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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

EDMOND PFOTZER AND E. JOHN PFOTZER,
CO-PARTNERS

Petitioners

VS

UNITED STATES

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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E. JOHN PFOTZER
Petitioners pro se

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QUESTIONS PRESENTED FOR REVIEW

1. Whether as a matter of law petitioners were arbitrarily, erroneously, and wrongfully denied their constitutional rights to "due process" by the United States Court of Claims, pursuant to their "PETITION" filed in said Court on 5 July 1972. The latter as containing petitioners' bifurcated claims involving their "breach of contract claims" submitted under 28 U.S.C. 1491, and collaterally their administrative claims involving the Wunderlich Act (68 STAT. 81 - 41 U.S.C. Sections 321 and 322).

2. Whether the Court of Claims, in its denial of "procedural due process" to petitioners had arbitrarily and wrongfully concluded that the Engineers Board of Contract Appeals was not required to

abide by its promulgated "RULES OF THE CORPS OF CONTRACT APPEALS 33 CODE FEDERAL REGULATIONS 210.4", and specifically as under paragraph "6. Pleadings - (b)" thereof.

3. Whether the Court of Claims had denied petitioners "procedural due process" by arbitrarily and wrongfully concluding that petitioners had waived their right to the Board's promised full-scale hearing as was otherwise appellants' entitlement under paragraph "11. Submission without a hearing" as contained in the "RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS".

4. Whether the Court of Claims had denied petitioners "procedural due process" by arbitrarily and wrongfully concluding that petitioners were not entitled to

the Board's "good faith" administration of paragraph "(e) Preface to Rules" of the "RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS" and specifically as relating to continuances ". . . on good cause shown".

5. Whether the United States Court of Claims wrongfully deprived plaintiffs of "procedural due process" when it sustained the Engineers Board's breach of "ARTICLE 15 - DISPUTES" of appellants' contract which impliedly promised the Government's "Good Faith" adjudication of disputes and as in collateral violation of plaintiffs' rights under the standards of the Wunderlich Act, 41 U.S.C. Sections 321 and 322 pursuant to the Board's adjudication of "ARTICLE 15 - DISPUTES" supra.

6. Whether, as responsive to the provisions of the Wunderlich Act, the Court of Claims' Orders of 6 February and 15 May 1981 as ruling on plaintiffs' restrictive "MOTION FOR SUMMARY JUDGMENT ETC." (as in accord with the Court's prior direction), involved only the Corps of Engineers Board of Contract Appeals' Decisions of 16 August 1978, and thereby had only dispositive subject matter jurisdiction of the said administrative claims. The latter as differentiated from plaintiffs' bifurcated "breach of contract claims" which had not been heard nor adjudicated by the Court of Claims (1. supra).

7. Whether the Court of Claims made a partially void judgment when by its Orders of 6 February and 15 May 1981, it

mistakenly, erroneously, inadvertently and by excusable neglect dismissed plaintiffs' petition dated 5 July 1972 in toto without having adjudicated plaintiffs' bifurcated "breach of contract claims" (1. supra).

8. Whether, following the filing of plaintiffs' "MOTION FOR THE VACATING ETC." of the Court of Claims' prior erroneous ORDERS of 6 February and 15 May 1981 (and despite plaintiffs not having been officially informed by the Court of its unilateral mistake, inadvertence, surprise, excusable neglect, and partially void judgment until 24 September 1981), the Court was nonetheless justified in dismissing plaintiffs' action under its "RULE 152. RELIEF FROM JUDGMENT OR ORDER". The latter dismissal despite the

totality of the foregoing, and as allegedly responsive to Rule 152 (b)(1), and specifically (4) the judgment is partially void (see 7 supra) or additively as under (6) any other reason justifying relief from the operation of the judgment (the Court's defective judgment).

9. Whether the Court of Claims, having been informed in plaintiffs' "Briefs" in support of their "MOTION FOR SUMMARY JUDGMENT" and their "MOTION FOR REHEARING OF THE COURT'S ORDER OF FEBRUARY 6, 1981" that plaintiffs' motion was in effect for partial summary judgment, and similarly as set out in plaintiffs' "MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981", under the totality of the

involved circumstances should have in equity vacated its ORDERS[1] of February 6, 1981 and May 15, 1981, sua sponte, that is, prior to September 24, 1981, as soon as the Court first had knowledge of its partially void "ORDERS", POINT IV, pages 58 to 63.

1/ PETITIONERS PERTINENTLY POINT OUT THAT THERE WAS NO DECISION BY THE COURT OF CLAIMS UPON PLAINTIFFS' "BREACH OF CONTRACT CLAIMS", AND FURTHER, THAT NO DECISION THEREON WAS NECESSARY TO "REVIEW THE ENGINEERS BOARD OF CONTRACT APPEALS INVOLVING DENIAL OF PROCEDURAL DUE PROCESS". HENCE THE COURT'S DISMISSAL OF THE PLAINTIFFS' PETITION "IN TOTO" WAS SURPLUSAGE AND IN ERROR AND PLAINTIFFS ARE NOT BOUND THEREBY. SCHOFIELD V. RIDEOUT, 233 WIS. 550, 290 N.W. 155 (1940)

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OPINIONS BELOW

The original Court of Claims' ORDER, dated 6 February 1981 dismissing plaintiffs' "Complaint" is designated A, page 1a, of the Appendix; and the Court of Claims' ORDER, dated 15 May 1981 denying plaintiffs' "Motion for Rehearing" is designated B, page 21a of the Appendix; and the Court of Claims' ORDER, dated 16 July 1982 denying plaintiffs' "Motion for the Court's Order Vacating Etc. Its Judgments of February 6, 1981 and May 15, 1981" is designated C, page 22a of the Appendix; and finally the Court of Claims' ORDER dated 10 September 1982 denying plaintiffs' "Motion for Rehearing of Court's Order of July 16, 1982" is designated D, page 27a of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of "Title 28, United States Code 1255". The Supreme Court of the United States, by ORDER dated 1 December 1982, extended petitioners' filing date for "PETITION FOR WRIT OF CERTIORARI" to and including 7 February 1983.

STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENTS

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

THE WUNDERLICH ACT

(68 Stat. 81, 41 U.S.C.)

Section 321. Limitation on pleading contract-provisions relating to finality; standards of review.

No provision on any contract entered into by the United States, relating to the finality or conclusiveness of any decision on the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision on any administrative official, representative, or board.

APPLICABLE RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS 33 CODE OF FEDERAL REGULATIONS 210.4

Preface to Rules

(b) For this reference, see page xvii.

(c) Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

(d) Preliminary procedures are available to encourage full disclosure of relevant and material facts, and to discourage unwarranted surprise. The parties are expected to cooperate and to voluntarily comply with the intent of such procedures without resort to the Board except on controversial questions. The Board may order exchange of complicated exhibits prior to hearing in order to expedite the hearing.

(e) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension in appropriate circumstances, on good cause shown.

6. Pleadings.

(a) Within 30 days after receipt of notice of docketing of the appeal, as provided in the last sentence of Rule 3, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of his claims, alleging the basis with appropriate reference to contract provisions for each claim, and the dollar amount claimed. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form or formality is required. Upon receipt thereof, the Recorder of the Board shall serve a copy upon the respondent. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth his complaint and the respondent shall be so notified.

(b) Within 30 days from receipt of said complaint, or the aforesaid notice from the Recorder of the Board, respondent shall prepare and file with the Board an original and two copies of an answer thereto, setting forth simple, concise and direct statements of respondent's defenses to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counterclaims, as

appropriate. Upon receipt thereof, the Recorded shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

8. Hearing - election.

(a) Upon receipt of respondent's answer or the notice referred to in the last sentence of Rule 6(b), appellant shall advise the Board whether he desires a hearing, as prescribed in Rules 17 through 25, or whether in the alternative he elects to submit his case on the record without a hearing, as prescribed in Rule 11.

(b) In appropriate cases, the appellant shall also elect whether he desires the optional accelerated procedure prescribed in Rule 12.

11. Submission without a hearing.

Although both parties are entitled to a hearing under these rules, either party may elect to waive a hearing and to submit his case upon the Board record as settled pursuant to Rule 13. Such an election by one party shall not preclude the other party from requesting and obtaining a hearing. Affidavits, deposi-

tions, answers to interrogatories and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral arguments, transcribed if requested, and by briefs arranged in accordance with Rule 23.

17. Hearings - Where and when held.

Hearings will ordinarily be held in Washington, D. C., except that, upon request seasonably made and upon good cause shown, the Board may in its discretion set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may in its discretion advance a hearing.

18. Notice of hearings.

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will give due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

19. Unexcused absence of a party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

29. Motions for Reconsideration.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

N.B. The following paragraph should have appeared at the top of page xvii supra.

(b) When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may in its discretion hear, consider and decide all questions of law necessary for the complete adjudication of the issue. In the consideration of an appeal, should it appear that a claim is involved which is not cognizable under the terms of the contract, the Board may make findings of fact with respect to such a claim without expressing an opinion on the question of liability.

ARTICLE 15. DISPUTES.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative whose decision shall be final and conclusive upon the parties hereto. in the meantime the contractor shall diligently proceed with the work as directed.

The foregoing is excerpted from Contract No. DA-49-080-Eng-27 Dated 7 September 1949, for six additional filters at the Dalecarlia Filtration Plant, Washington Aqueduct, Washington, D. C. Also see "THE WUNDERLICH ACT" (xii supra).

STATEMENT OF THE CASE

At the outset, this court's attention is respectfully invited to the fact that petitioners are initially challenging herein the Engineers Board of Contract Appeals' involved procedures and decisions upon constitutional grounds; namely: the Board's denial of "procedural due process" to appellants. Pertinently, the courts have stated that the solution of such challenges is unsuited to administrative hearing procedures, and accordingly access to the courts is essential to the decision of such questions, Johnson v. Robinson, 415 U.S. 361, 366-367; and derivatively plaintiffs are challenging the erroneous legal decisions of the Court of Claims devolving from plaintiffs' "Motion for Summary Judgment" pursuant to its

Rule 163. Dispositive Motions (b)(2), and Rule 152. Relief from Judgment or Order.

The pertinent administrative record before the Engineers Board as commencing with 18 March 1978 shows that appellants timely filed twelve amended complaints in accord with the Board's "Rule 6. Pleadings" (79a). The twelve amended complaints incorporated appellants' newly discovered evidence, which had been obtained from respondent's records, under a prior Court of Claims' order. Appellants' filing of their twelve amended complaints was completed on 4 April 1978 (79a)[1]. Subsequently the respondent (herein referred to as government) failed to respond to any of appellants' twelve amended complaints within the thirty day

1/ All references shown as (79a etc.) refer to pages of petitioners' "Appendix" and as identified on its TABLE OF CONTENT.

period as required by the Board's pertinent Rule 6(b) and "Preface to Rules, paragraphs (c),(d) and (e)".

Pursuantly, appellants on 20 June 1978 (79a), more than 75 days after the filing of their complaints supra, wrote the Engineers Board and specifically complained of the government's violation of the Board's "Rule 6. Pleadings. (b)" and relevant parts of the Board's "Preface to Rules, paragraphs (b),(c),(d) and (e)". On 22 June 1978, the Engineers Board responded by letter addressed to the government's several trial attorneys and informing them that they should answer appellants' complaints within 30 days. It is to be noted that to the date of 22 June 1978, the Board had also collaterally violated its Rule 6(b) which re-

quired the Board to act within 30 days of appellants' filing of their complaints and additively as reflecting paragraphs (c),(d) and (e) of its "Preface" to its Rules supra. Ultimately the government's twelve answers to appellants' complaints were received eight months after the filing of appellants' complaints; that is, on 27 November 1978, one week before the 5 December 1978 hearing date.

Following the receipt of a copy of the Board's letter (83a) supra, the appellants in their intensive efforts to receive the government's required essential answers to their twelve complaints supra, so as to timely prepare for the scheduled 5 December 1978 hearing, diligently sought to secure the Board's cooperative assistance in their endeavors.

Such cooperative assistance was never supplied.

As evidencing appellants' efforts to have the Board require the government to answer their complaints, petitioners list the following documents as progressively developed in connection with appellants' attempts to secure "procedural due process". These referenced documents were included, by identified page numbers, in plaintiffs' "Appendix", as was filed in the Court of Claims in support of "Plaintiffs' Appeal from Engineers Board of Contract Appeals Decisions, Rulings and Orders Promulgated August 28, 1979"; namely:

1. Appellants' Motion and Supporting Brief dated July 13, 1978 (11 pages-29a)

2. Appellants' Letter to Board dated 21 July 1978 (3 pages-43a).

3. Appellants' Letter to Board dated September 22, 1978 (2 pages-50a)

4. Appellants' Letter to Government Trial Attorney dated September 22, 1978 (2 pages-53a)

5. Appellants' Letter to Government Trial Attorney dated September 25, 1978 (5 pages-56a)

6. Appellants' Letter to Board dated 7 October 1978 (5 pages-61a)

N.B. The numbers shown next above are not to be confused with those shown herein in petitioners' "Appendix".

Next, as the scheduled hearing date of 5 December 1978 approached, appellants intensified their efforts to secure the government's answers to appellants' twelve complaints as responsive to the Board's Rule "6. Pleadings. (b)" so as to

insure receiving essential "procedural due process". Appellants' further successive efforts are set out in corroborative detail in the "Table of Content" of petitioners' "Appendix", and include:

7. Appellants' "Motion for Postponement Etc.", 8 November 1978 (31a)

8. Appellants' "Brief in Support of Motion" supra, 10 November 1978 (32a)

9. Appellants' "Supplementary Brief in Support of Motion", 14 November 1978 (37a)

10. Board's "Order", 15 November 1978 (42a)

11. Renewal of Appellants' "Motion of November 8, 1978", 18 November 1978 (44a)

12. Appellants' "Motion to Stay Etc." 22 November 1978 (50a)

Pursuant to the foregoing: on 27 November 1978 appellants received the government's twelve (12) answers en masse as in ostensible response to appellants' complaints, but as then in patent violation of the Board's "Rule 6. Pleadings. (b)" supra, as well as in affirmative violation of the Board's correlative "Preface to Rules. (c),(d) and (e)" supra. It is clear that the appellants had been frustrated in their endeavors to be timely apprised of the government's answers and not as otherwise apprised on the eve of the scheduled hearing date.

Because of its essentiality to the proper presentation of appellants' claims before the Engineers Board, appellants reiterated their prior urgent requests for a continuance of the 5 Decem-

ber 1978 hearing date, specifically as shown by:

13. Appellants' Western Union Letter, 3 December 1978 (56a)

Appellants, in their papers, items 1 to 13, pages 5,6,7,and 9 supra, had repeatedly informed the Board that the failure of the government's trial attorneys to timely comply with the established essential procedural pleading requirements, and their added last-minute pyramiding of twelve motions for dismissal etc. necessitated appellants requesting the Board for a continuance of the 5 December 1978 hearing date. However, the Board had persistently refrained from acting upon appellants' prior motions and requests, but nonetheless had a concomitant awareness that it intended to deny appellants'

requests, and thereby to collaterally introduce a serious handicap to appellants' effective presentation of their claims. Appellants submit that such procedure, as predicated on the record, had been planned by the Board and was finally effectively implemented by the Board's Order (53a). The latter was transmitted under date of 30 November 1978 and received by appellants on 4 December 1978.

Pursuantly, the first paragraph of the Board's Order stated:

> "The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in Eng. BCA 2678 unless the 5 December 1978 hearing is postponed."

Thus a qualified possibility of an open-ended postponement was expressed; however, in its final paragraph, the Board's expressed potentiality became non-existent:

> "The unexcused absence of a party at the pre-hearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11."

In appellants' opinion, the foregoing vacillating "order" represented a clear attempt at coercion by the Board and was intended not only to deprive appellants of a necessary continuance indispensable under the circumstances but also intended to pave the way for the Board and the government's trial attorney to collectively attempt to proceed to adjudicate the disputes upon a defective administrative record; and for the government to thereby not to have to meet the collateral allegations of fraud as contained in a number of appellants'

twelve complaints. For the Engineers Board to hold a substitute "ex parte" hearing as "on the record" in lieu of the otherwise expressly promised "full-scale" hearing (28a), constituted an obvious instance of "a broken promise" by the Board. That is the opposite of the promise of a "full-scale hearing" and one upon which the appellants had fully relied. This development as was progressively programmed was an obvious instance of the Board's "bad faith" administration of "ARTICLE 15: DISPUTES" of the contract. Clearly it was on its face not a "good faith procedural due process" adjudication and such as is guaranteed by the United States Constitution. Estoppel was thus involved supra.

As in response to the developments next above, appellants necessarily dis-

patched the following protesting communications to the Board as intended with abundant "good cause" to resist the Board's coercive efforts to deprive appellants of "procedural due process" and to collaterally urge the Board's favorable remedial action.

14. Appellants' Letter of Confirmation of Western Union Telegram of 4 December 1978 Re: Board's Hearing scheduled for 5 December 1978 dated 4 December 1978 (58a)

15. Appellants' Letter of Confirmation of Western Union Telegram of 5 December 1978 Re: Board's Hearing Scheduled for 5 December 1978 dated 5 December 1978 (60a)

16. Appellants' Mailgram Re: Protest of Lack of "Due Process" dated 6 December 1978 (62a)

17. Appellants' Mailgram to Trial Judge, Court of Claims, dated 17 December 1978 (64a)

Despite the totality of the foregoing, the Engineers Board adamantly, arbitrarily, capriciously and erroneously, and in abuse of its discretion under the circumstances, rejected all of appellants' importunities and continued to preemptorially deny appellants' requests out-of-hand.

The foregoing represents the initial aspects pertinent to the Board's denial of "lack of procedural due process" clearly in violation of the Board's pertinent Rules, "Preface paragraphs (c),(d) and (e)" and "Rule 6. Pleadings. (b)", and the foregoing affirmative violations are to be contrasted with another comparable situa-

tion as is squarely on all-fours, and as involving a coordinate Administrative Board's Decision; namely: United States v. J. Hubert Smith, as is recorded in "Decisions of the Department of the Interior", 311 (67 I.D.), Decided 1 August 1960 (86a). Appellants submit that it is clear the Board knew or should have known that its contentions were wrongful and that in knowingly depriving appellants of their rights at law, the Board perpetrated a wrong not only against the appellants but also against the Court of Claims.

As predicated upon the Board's actions supra, it is to be observed that the Board sanctioned and condoned the government's last-minute wrongful filing of its twelve answers to plaintiffs' twelve complaints and thereby making it impossible

for plaintiffs to timely analyze and reflect the content of the government's answers in appellants' effective presentation of their case before the Board.

Immediately prior to, and subsequent to, the Board's Order of 30 November 1978(53a), as received by appellants 4 December 1978, as on the eve of the hearing date, appellants again protested and timely informed the Board that they were unwilling, under the attendant circumstances, to prejudice their vested rights to the constitutionally guaranteed "procedural due process" and collaterally informed the Board that they were thus unable to participate in the Board's otherwise intended unilateral (ex parte) hearing. Nevertheless, on 5 December 1978 the Board, over appellants' repetitive,

timely objections and as in abuse of its administrative discretion, and as arbitrarily and capriciously reneging on its promise to hold a "full-scale hearing" (28a), commenced its "ex parte-some kind of hearing" and which of a certainty could but deprive appellants of their constitutional right to "procedural due process".

Apropos of the foregoing, it is to be noted that appellants (by Item 14., (58a), page 13 supra) specifically informed the Board:

> "Also we do not waive a hearing, nor agree to submitting our case on the record."

The latter statement clearly and timely informed the Board of appellants' contentions as to their contemplated action to prevent the deprivation of their right to

"procedural due process" and as contemplative of a "full-scale hearing".

Pursuantly, the record shows as by Items 1 to 15 as identified supra, that appellants had timely and strenuously protested the procedural deficiencies condoned by the Board as being violative of its own basic pleading procedures, and that such specified deficiencies were depriving plaintiff, at the very threshold to the hearing-room of the protection of the Board's rules (xiii supra), a part of its governing regulations as specifically involving basic pleading procedures. The foregoing "Rules" are essential to, and intended for, the protection of both the appellants' and the respondent's contractual and constitutional right to "procedural due process". Hence, from the

factual totality of the foregoing, appellants assert they were wrongfully denied a "full-scale" evidentiary hearing as a consequence of the Board's arbitrary, capricious and erroneous contention that appellants had, contrary to fact (p. 17 supra), waived their right to a full-scale evidentiary hearing. The constitutional right to a full-scale hearing is elemental as necessarily providing "procedural due process". The foregoing was concluded by the Supreme Court in Morgan v. United States, 298 U.S. 468 (1936) and in 304 U.S. 1 (1937) wherein Mr. Chief Justice Hughes so succinctly stated:

> "The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall

be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion, uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

CONTINUED STATEMENT OF THE CASE AS SPECIFICALLY RELATES TO THE COURT OF CLAIMS' SUBSEQUENT PARTICIPATION IN THE MATTER OF ADJUDICATING PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979

On 7 December 1973, the Court of Claims' Trial Judge, to whom the action had been assigned, issued "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS". The Court's order was intended to facilitate the processing of certain claims contained in plaintiffs' petition to the Court of Claims

by the Engineers Board. That is, for the possible processing by the Board ". . . for Expedited Discovery, Inspection, Hearing, Rehearing and Reconsideration." Said claims were thus channeled to the Engineers Board for its potential administrative consideration and adjudication and said claims were totally independent, separate and distinct from certain other "breach of contract claims" as were so designated and collaterally included in plaintiffs' "Petition" which had been filed in the United States Court of Claims on July 5, 1972.

Seven years later, on August 28, 1979 the Engineers Board issued its Decision on its "ex parte" hearings of the certain claims as had been remanded supra for potential processing. On November 16, 1979,

the Trial Judge (66a) informed plaintiffs in response to their query as to the next procedural step to be taken concerning the claims which had been previously forwarded the Engineers Board for administrative action that the next procedure for plaintiffs was to ". . . file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals". The foregoing query and response related only to the claims which had been in fact remanded on 7 December 1973 supra. Clearly as by the Court of Claims' specific advices, such potential motion was to be restricted to the specific claims remanded and was not to include the bifurcated "breach of contract claims" which had not been therebefore considered or adjudicated in any

sense by the Court of Claims. That is, plaintiffs' "breach of contract claims" had received no adjudicative processing by the Court during the entire period that the Court, as a result of its stay, was also awaiting the Board's decisions in the "remanded claims". Pursuant and responsive to the Trial Court's advices supra, plaintiffs duly filed their motion for summary judgment and such motion was properly restricted to their single threshold contention that they had been denied "procedural due process" prior to the scheduled December 5, 1978 hearing. Thereafter, and as solely dependent on the outcome of the Court's decision on plaintiffs' restricted "MOTION FOR SUMMARY JUDGMENT", it was anticipated the parties would then be duly informed if

the Court might possibly adjudicate "de novo" the remanded claims which had been decided "ex parte" by the Board, and also be advised when the Court's adjudication of plaintiffs' "breach of contract claims" would commence. The latter as had been stayed on December 7, 1973 by the Court of Claims' Trial Judge (page 20 supra).

It is necessary for continuity to add at this point that plaintiffs have stated that until 26 September 1981, plaintiffs were of the belief that the only claims which had been in fact dismissed by the Court on February 6, 1981 (1a) were those restrictively included by the Trial Judge's instruction in plaintiffs' "MOTION . . ." supra. However, as of 24 September 1981, plaintiffs were officially informed by the Clerk of the Court

of Claims (74a) that the Court had dismissed not only plaintiffs' claims which had been restrictively included in their "Motion For Summary Judgment", but correlatively their entire "Petition" filed 5 July 1972 and which included their bifurcated "breach of contract claims". The Clerk's letter was responsive to plaintiffs' letter of September 19, 1981 (67a) as addressed to the Court of Claims' Trial Judge.

As premised upon the content of the preceding three paragraphs, the following recital represents the chronological, procedural developments in the Court of Claims subsequent to the Board of Contract Appeals issuing on August 28, 1979 its administrative decisions as only involved a part of plaintiffs' bifurcated claims in-

cluded in their petition filed July 5, 1972 in the Court of Claims; namely:

By letter dated 16 November 1979 (66a), the Court of Claims' Trial Judge, having full knowledge of all prior developments in the case, informed plaintiffs as follows:

"Gentlemen:

> As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly."

Plaintiffs thereafter responsively filed their motion, comprehensive brief and appendix entitled:"PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS, AND ORDERS PROMULGATED AUGUST 28, 1979".

ON FEBRUARY 6, 1981 THE COURT OF CLAIMS ISSUED ITS ORDER (A-1a) AND WHICH WAS CONCLUDED BY THE WORDS: "THE PETITION IS DISMISSED".

N.B. Informatively it is stated that Plaintiffs were not accorded a hearing on their motion etc.

Plaintiffs timely appealed the Court's Order of February 6, 1981 by motion, comprehensive brief and appendix entitled: "PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR REHEARING OF COURT'S DECISION OF FEBRUARY 6, 1981".

On May 15, 1981, the Court, without granting plaintiffs oral argument, issued its Order concluding with the words: "IT IS ORDERED THAT PLAINTIFFS' SAID MOTION FOR REHEARING IS DENIED" (B-21a)

As pointed out above, pages 24 and 25,

plaintiffs were officially advised by the Clerk of the Court of Claims that their entire petition filed July 5, 1972, and as included their "breach of contract claims" had been dismissed "in toto".

Plaintiffs, in their endeavor to remedy the situation, and in great detail, compiled an appendix to show that their petition contained "breach of contract claims" and should not have been dismissed "in toto". The foregoing in the belief that if the Court did not have the extreme in "convincing evidence before it", to show that the Court's "dismissal" of February 6, 1981 was grossly in error, there would be but another cursory denial.

Accordingly, plaintiffs duly filed their motion, comprehensive brief and

appendix entitled:

"PLAINTIFFS' MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981"

On July 16, 1982, the Court of Claims without oral argument issued its order concluding with the words: "Plaintiffs' motion under Rule 152(b) is denied." (C-22a)

Plaintiffs subsequently filed their motion for reconsideration of the Court of Claims' Denial supra inasmuch as the Court's decision had been issued prior to plaintiffs' filing of their reply to defendant's opposition to plaintiffs' motion next above. Accordingly, plaintiffs filed their reply memorandum entitled:

"PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 152 TO VACATE THE COURT'S ORDERS OF FEBRUARY 6, 1981 AND MAY 15, 1981"

On September 10, 1982, the Court

denied rehearing, reconsideration or other relief (D-27a).

Subsequently petitioners once again turned to this Court for relief from what is in their opinion a denial of their constitutional right to "procedural due process" by the Engineers Board of Contract Appeals, and for relief in turn from what is in their opinion a series of erroneous orders (judgments) by the Court of Claims; and wherefore the said matters are being advanced by PETITION FOR WRIT OF CERTIORARI.

ARGUMENT

POINT I.

THE ENGINEERS BOARD DENIED APPELLANTS "PROCEDURAL DUE PROCESS" AS REQUIRED BY ITS REGULATIONS

The record shows that appellants duly filed their twelve separate complaints as covering separate claims in accord with the Board's "Rule 6. Pleadings. (a) and (b)" and (e) of the "Preface to Rules" (xiii), and which rules correlatively required the government to answer appellants' complaints within 30 days thereafter, xiv supra. On June 20, 1978 (79a), approximately 90 days (on average) after plaintiffs' complaints had been served, plaintiffs complained to the Board that the government's necessary answers had not been received. On June 22, 1978 (83a) the Board informed the government's attorney

that the answers should be filed within 30 days thereafter. It is to be noted that the Board itself was negligent in not fulfilling its duty under Rule 6(b), and (e) of the "Preface" provisions, and which required the Board to monitor the required pleading developments so as to provide substantial and impartial justice to the parties.

Pertinently: the record shows, pages 2 to 10 supra, that appellants had faithfully endeavored to secure the government's answers to the end that they might effectively adapt appellants' presentation of their case, to the admissions, denials or affirmative defenses or counterclaims of the government's answers, and in toto "This pleading (answer) shall fulfill the generally recognized requirements of an

answer", Rule 6(b) (xiii supra).

The Supreme Court is respectfully requested to scrutinize the pertinent detailed record as has been set out upon pages 5 to 8 supra, and to note that the government's twelve answers were in fact not received by the appellants until November 27, 1978, which was on average eight (8) months after they had been served. Said delay ensued despite appellants' most strenuous efforts to obtain the government's answers. After the expiration of six months, and the answers had not been received (See pages 5 and 6 supra), appellants invoked Rules (c),(d) and (e), pages xiii and xviii supra, for relief, and which was not forthcoming; and in view of the continued non-receipt of the government's answers, appellants

requested a continuance of the 5 December 1978 hearing date under the Board's Rules, "Preface to Rules, (c) and (d)" (See 33a, 37a, 43a, 44a, 53a, 56a, 58a, 60a, 62a, and 64a. Factually, the government's answers were due not later than May 10, 1978; they were not received until November 27, 1978.

The totality of the foregoing evidences that all of appellants' efforts to timely secure the government's answers were futile despite appellants' full compliance with the Board's Rules.

Pertinently: the Court's attention is invited to an Interior Board of Contract Appeals' decision (86a) as involves a pleading answer on all fours with the subject situation; namely: United States v. J. Hubert Smith, A-28387, recorded in "De-

cisions of the Department of the Interior" 311 (67 I.D.), Decided 1 August 1960: Mining Claims: Contests--Rules of Practice: Government Contests--Regulations: Waiver, and including the following quotation therefrom:

> "In a recent decision, Earl D. Deater v. John C. Slagle, A-28121 (May 24, 1960), the Department held that under the rules of practice where an answer to a complaint in a private contest is filed one day late the allegations of the complaint must be taken as admitted by the contestee and the case decided without a hearing, and that the Secretary is without authority to waive the rules to permit the late filing of the answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Chapman v. Sheridan-Wyoming Coal Company, 338 U.S. 621 (1950)"

Appellants submit that the underlined portion above is applicable herein, and that appellants' allegations as set out in

their complaints should have been taken as admitted by the government and the case decided without a hearing. The Engineers Board was without authority to disregard its own regulations; namely: "Rule 6. Pleadings (a) and (b)" and "Preface to Rules (c), (d) and (e)".

Pursuantly, the government and appellants had bargained for "good faith" administration as under the applicable provisions of the Wunderlich Act (xii supra). As based on the totality of the foregoing, the Board of Contract Appeals failed to provide that which the government had promised: "good faith" administration. As a consequence of the Board having so wrongfully disregarded its own regulation supra, the appellants were denied "procedural due process" and subsequently

suffered great damages as devolved from the Engineers Board's capricious, arbitrary and grossly erroneous decisions as necessarily imply "bad faith" supra.

POINT II

PETITIONERS ASSERT THEY MADE NO LEGAL WAIVER OF APPELLANTS' CONTRACTUAL AND CONSTITUTIONAL RIGHT TO A "FULL-SCALE HEARING" OF THEIR TWELVE SUBJECT CLAIMS AGGREGATING $190,000.00 AS BEFORE THE ENGINEERS BOARD OF CONTRACT APPEALS, NOR MADE LEGAL ELECTION TO SUBMIT THEIR CLAIMS ON THE RECORD UNDER BOARD RULE 11

Petitioners have asserted and evidenced under POINT I that they had not received "procedural due process" in that the Board repeatedly violated its regulations: "Rule 6. Pleadings. (a),(b)" and (c),(d) and (e) of its "Preface to Rules". Appellants informed the Board after their repeated protests and notices had been ignored they were unwilling to commence a

less than meaningful "full-scale hearing" and as clearly set out in appellants' letter of 3 December 1978 (57a), telegram of 4 December 1978 (59a), telegram of 5 December 1978 (60a), and mailgram of 6 December 1978 (62a). Said situation had progressed toward an impasse as a consequence of the government's attorney not supplying answers to the twelve separate claims (aggregating $190,000.00, exclusive of "breach of contract claims" then pending before the Court of Claims) until 27 November 1978. The latter as seven days before the 5 December 1978 hearing date and condoned by the Board.

Upon 5 December 1978 the Board commenced an "ex parte" hearing allegedly in accordance with its Rule 11 and stating that its authority for doing so was that

appellants had waived their right to a "full-scale hearing" by their non-appearance. Appellants had therebefore advised the Board that they would not jeopardize their vested contract rights to the timely receipt of the government's answers; and absent which answers they would be crippingly handicapped in the factual and legal presentation of their case. Had they proceeded without such insistence, the same Board would subsequently have asserted that appellants had voluntarily proceded with the hearing. Correlative to the Board's prior statement that appellants had waived their right to a "full-scale hearing", it supplemented such statement (on page 2, paragraph 2 of its decision dated 28 August 1979) by concluding:

"We conclude that appellants' failure

> to appear on 5 December 1978 was in legal effect an election to submit on the record."

Pertinently: can this Court believe such assertion in the face of the record that appellants elected to submit on the record? After having itself blatantly violated its pleading rules, it joined in making it possible for the government to likewise violate its rules. More accurately, should it not be said: "The Board and the government's attorney in legal effect elected to first wrongfully violate the Board's rules and then to develop such a complex situation as would inevitably thwart appellants' endeavor to secure relief from the Court of Claims?

Petitioners assert that the totality of the involved facts clearly evidences that they did not legally elect supra to

submit their claims on the record and contrariwise they stated they did not waive a hearing (58a) as covering the twelve claims aggregating $190,000.00 before the Board. Petitioners state that the Board held its "ex parte" hearing under its Rule 11 (55a). Reference to Board's Rule 11 (xv supra) will show that said "Rule 11. Submission without a hearing" places the election ". . . to waive a hearing and to submit a case upon the Board record. . ." solely in either party's control but not in the Board's control. The record shows that the appellants requested and desired a "full-scale hearing" and not an imitation thereof as the Board was intent on ultimately supplying. Pertinently see Camel Mfg. Co. v. The United States, 214 Ct Cls 470, wherein the Court

at p. 486 stated:

> "As plaintiff notes, the cited section constitutes only a ruling and this is not due the same deference as a properly issued regulation" (Rule 11).

The regulation in the subject circumstances precluded resort to Rule 11, page 35 supra.

Pursuantly it is to be noted that the Board wrongfully sought to channel the twelve separate claims aggregating $190,000.00 into a channel conventionally reserved for small claims of $1000.00 to $2000.00. Apropos thereto, the Court is requested to scrutinize the decision (84a to 86a) Re: Appeal of Morgan Construction Company, (67 I.D.) IBCA-253, Decided September 20, 1960:

> "Contracts: Appeals: Contractor-appellant has a contractual right to 'be afforded an opportunity to be heard and to offer evidence in support of its appeal.' This right must be honored even if amount of claim in-

> volved is small. Parties may stipulate to submit appeal 'on the record.'" (Underlining supplied)

Therein the Board, in lieu of a hearing on the record as urged by the government, because of the small amount of the claim, stated:

> "This course of action seems to be desirable, indeed. However, the Board has no power to compel the appellant to follow this course of action as it has a contractual right to a hearing, regardless of the amount of the claim involved. Hence, the Board denies the motion in so far as it concerns further procedures concerning Claims Nos. 1 and 3."

Finally, and again referring to the Board's statement that appellants waived their right to a "full-scale hearing", petitioners submit that contrariwise there was no waiver, for as in accord with established principles of law: a waiver constitutes the intentional relinquishment of

a known right, and even as including the intentional waiver of a constitutional "due process" right. However, it is and must remain, a voluntary act. A waiver implies or expresses an election by a party to dispense with something of value which he might at his option have demanded, 56 Am Jur 102. Petitioners assert that the Board's conclusion supra that appellants had elected to waive their contract right to a "full-scale hearing" is in error. Such alleged waiver would clearly have to be a voluntary and intentional renunciation, or as otherwise clearly indicated by some affirmative inaction inconsistent with a vested contract right or constitutional right, and such waiver is absent in the instant situation. See Long v. Clark, 135 Pac. Rep 673. The

only inconsistent act herein involved is that of the Board, which arbitrarily and capriciously attempted to insist on doing for appellants that which they expressly refused to do for themselves (58a).

Petitioners assert that the Engineers Board, in totality, as set out above as under the standards of the Wunderlich Act, acted capriciously, arbitrarily, erroneously to such degree that its actions equated to "Bad Faith" administration.

POINT III

THE ENGINEERS BOARD OF CONTRACT APPEALS EXPRESSLY PROMISED APPELLANTS ". . .A FULL-SCALE HEARING. . ."(28a) AND WHICH CONVENTIONALLY SHOULD HAVE EQUATED TO THE CONCEPT OF "PROCEDURAL DUE PROCESS" AS CONTEMPLATED BY JUDGE FRIENDLY'S[1] "SOME KIND OF HEARING" AND PERTINENT ASPECTS OF WHICH ARE HEREINAFTER INCLUDED

1/ Judge, United States Court of Appeals for the Second Circuit, University of Pennsylvania Law Review, Vol. 123, pp. 1267-1317.

Appellants have asserted that the Engineers Board initially denied them "procedural due process" as related to the refusal of the Board to honor its own regulations, POINTS I AND II supra, and also denied appellants "due process" when it denied them a "full-scale hearing". Specifically the Board by letter dated June 26, 1978 (28a), informed the appellants ". . . that a full-scale hearing in connection with the above-captioned appeals has been scheduled to commence. ." (Underlining supplied). Petitioners submit the words "full-scale hearing" are descriptive words of art conveying a well-recognized legal meaning.

Apropos of the foregoing, in Morgan v. United States, 298 U.S. 468 (1936), and in 304 U.S. 1 (1937) it was said:

(298 U.S. 473) "Before reaching these questions we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order..."

(304 U.S. 1)"(1) The right to a "full hearing" embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one..."

(304 U.S. 8)"The more extensive the employment of the implement of the administrative tribunal becomes-and its use is daily becoming more widespread-and the more credit which is given to its decisions, the more important is it that strict regularity be observed in the conduct of its hearings and that all the elements of a full and fair hearing and of due process of law be accorded.

(304 U.S. 15) "These demand a 'fair and open hearing',-essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73;

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305.

THE BOARD'S ADMINISTRATIVE JUDGE WAS DUTY BOUND NOT TO DEPRIVE APPELLANTS OF THEIR "DAY IN COURT"

In the citations next above, the court emphasized that a decision based on evidence is the indispensable requisite of "due process". Clearly then, when the Board, over appellants' repetitive objections, otherwise proceeded to conduct a prejudicial "ex parte hearing" it affirmatively precluded appellants from introducing their own evidence, and correlatively denied appellants their procedural right to utilize all other collateral customary elements of ". . . a full-scale hearing. . .". Such Board denials clearly constituted denials of "due process"; see Donnelly Garment Co. v. National Labor Board, 123 F.2d 215 (CCA, 8th 1941), and

appellants were thereby deprived of an opportunity to be heard "...at a meaningful time and in a meaningful manner.", Armstrong v. Manzo, 380 U.S. 545, 552, and thus to have their "day in court". Such meaningful time and meaningful manner were denied appellants and as basically stemming from not having timely obtained the government's answers (33a, 37a, 43a, 44a, 53a, 56a, 58a, 60a, 62a and 64a).

Pursuant to the foregoing: it is elementary that an administrative adjudication conforming to "due process" must bottom upon evidence specifically introduced by the parties, and as so appearing in the record, and a hearing on the record must be governed by conventional trial procedures. Absent such procedures, it was not possible for the Court to review the facts and applicable law, and then

fairly decide, if as in the subject situation, the ostensible findings of the Board are supported by evidence properly introduced by the parties. But the appellants as a fact were not permitted to introduce their evidence etc. and such to their great detriment. See Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U.S. 292 (1937). Furthermore, applicable law is to the effect that:

> "Nothing can be treated as evidence which is not introduced as such." United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 288 (1924).

THE RECORD SHOWS THE BOARD DEPRIVED APPELLANTS OF THEIR EXPRESSLY PROMISED " . . A FULL-SCALE HEARING. . ."

The Board, in depriving appellants of ". . .a full-scale hearing. . .", one wherein appellants could minimally pro-

perly introduce their own evidence etc., did at the threshold deprive appellants of fundamental "procedural due process". Clearly the Board's involved Administrative Judge should have taken all reasonable precautions to have so discharged his duties to avoid such situation occurring. It is a settled legal principle that the essence of the legal process, and particularly where the process is administratively adjudicatory, requires a fair trial; by an unbiased trier of the facts; who must act in good faith; and fairly listens to both sides. For such is the duty lying upon everyone who decides anything and particularly an Administrative Judge. Such Administrative Judge must always give a fair opportunity, in a meaningful manner, to those who are par-

ties in the controversy, for introducing, correcting or contradicting any relevant evidence etc. prejudicial to their view. And further, a trier of facts must particularly avoid arbitrary or capricious acts, or an abuse of discretion: otherwise "due process" is not accorded a litigant. Such essential impartiality etc. was absent in the several rulings and actions of the Board's Administrative Judge as was delagated to preside at the Board's promised ". . .full-scale hearing. . .".

Petitioners further assert as pertinent to the concept of a "full-scale hearing" as pertaining to the matter of "due process" and a "fair trial" that Mr. Justice Lamar, speaking for the Supreme Court in ICC v. Louisville & Nashville R.R., 229 U.S. 88 (1913), said that such full hear-

ing:

> ". . .conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. . .All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer explanation or rebuttal." (at 91, 93).

In other landmark cases the courts have repeatedly upheld similar basic principles; for examples:

(a) Southern Garments Mfrs. Ass'n. v. Fleming, 122 F.2d 622 (D.C. Cir. 1941):
"While the one who decides must hear, it must be remembered that 'hear' is used in the artistic sense of requiring certain procedural minima to insure an informed judgment by the one who has the responsibility of making the final decision and order." 122 F.2d at 626.

(b) In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U.S. at 136.

(c) Swift & Co. v. United States, 398 F.2d at 851 (7th Cir. 1962): "Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair plan and applicable procedural standards established by law." 398 F.2d at 851.

POINT V.

THE COURT OF CLAIMS NEGLIGENTLY AND ERRONEOUSLY DISMISSED "PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979"

Petitioners submit, as a matter of law, and as premised upon the facts etc. set out in the "STATEMENT OF THE CASE", and likewise as contained in "ARGUMENT-

POINT I., that the Court of Claims had erroneously failed to determine that the Engineers Board of Contract Appeals had in fact breached, and had likewise permitted the government's attorney to breach, the Board's regulations as pertained to "Rule 6. Pleadings. (a)(b)", and breached the Board's "Preface to Rules (c)(d) and (e)", and breached the Board's "Rule 11. Submission without a hearing." (xiii to xvii supra) And in addition:

The Court of Claims had erroneously failed to ascertain and determine that the Engineers Board had capriciously, arbitrarily and erroneously breached its own regulations, pp. 35 and 36 supra, and more pointedly as on pp. 49 and 50 supra. Likewise the Court of Claims had failed to observe and reflect the fact that the peti-

tioners had not waived their contractual and constitutional rights to the promised "full-scale hearing" of petitioners' twelve administrative claims in the aggregate sum of $190,000.00. The latter as had been remanded to the Board by the Court of Claims' "ORDER" of 7 December 1973, Item 6, pp. 27 to 29, as indexed on 76a. The foregoing is set out in necessary detail under POINT II, pp. 37 to 45 inclusive and with particular emphasis given to the content of the Board's "Rule 11. Submission without a hearing", pp. 41 and 42 supra. It is submitted that the foregoing as a matter of law also precluded the Board from holding an "ex parte" hearing.

But more, the Court of Claims with its huge reservoir of past experience and

expertise in the review of Engineers Board's decisions was fully aware that, as based on the totality of the foregoing, plus its finely-tuned sense of justice and fair play, should have readily perceived that the merits of the appellants' claims had not been fairly and justly considered and decided by the Board, pp. 47, 52, 53 and 54 supra; consequently it should have been evident to the Court that the appellants had been denied "their day in the Board's court". That is, petitioners had been denied elemental justice by the Board, and that as such the Engineers Board of Contract Appeals' decision had paralleled a comparable situation wherein Justice Field stated:

> "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial

> determination of his rights, and is not entitled to respect in any other tribunal." The foregoing excerpted from "Moore's Federal Practice", Vol. 7 (1974) Paragraph 60.25(2); M. 73 pp. 309-310.

Petitioners have heretofore stated on pp. 21, 22 and 23 inclusive that "PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS, DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979" had been solely restricted by the designated monitoring Trial Judge in the Court of Claims to the administrative claims which he had remanded to the Engineers Board by "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS" filed December 7, 1973 (see Item 6, p. 76a; underlining supplied). Apropos of the foregoing, it is to be carefully noted, pp. 24 and 25, that plaintiffs' petition of 5 July 1972 had been dismissed in toto.

But to necessarily back-track for

clarity: "Plaintiffs' Motion For Summary Judgment" was before the Court of Claims as relating only to the remanded, administrative claims supra. As based on the Court of Claims' concurrent full knowledge and as including its pertinent specific instruction to plaintiffs (67a), and informing them:

> "As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly."
>
> /s/ C. Murray Bernhardt
> Trial Judge

plaintiffs' prospective motion had a restrictive status. The foregoing instructions were given plaintiffs with the Court's full knowledge that plaintiffs' bifurcated "breach of contract claims"

were then pending before the Court awaiting adjudication. As responsive to the totality of the foregoing facts and circumstances, the Court of Claims was then faced with the single problem of deciding plaintiffs' motion for summary judgment supra and was solely restricted to the Court's consideration of the remanded administrative claims supra. That is to say, in deciding plaintiffs' summary judgment motion the Court then only had restrictive or limited subject matter jurisdiction and accordingly lacked judicial authority to dismiss the pending "breach of contract claims". The latter in that the said pending "breach of contract claims" had not been adjudicated by the Court, and consequently were not involved in the partial summary judgment motion as was sole-

ly before the Court. Accordingly, the bifurcated claims in plaintiffs' entire petition should not have been dismissed prior to a hearing on their merits, as a prerequisite to a court order of dismissal.

In partial summary of the above: plaintiffs submit that by their restricted motion for summary judgment of the claims ostensibly decided by the Board, pertinently the Court of Claims had only judicial power to dismiss those administrative claims as were before it--for proper reasons, if such existed; but it did not have collateral judicial power to dismiss the "non-adjudicated breach of contract claims" as were not included in plaintiffs' motion. The latter had a separate, distinctive, pending status under the Court's jurisdiction and were awaiting adjudication. That

is to say the Court lacked specific "partial subject matter jurisdiction" to legally state: "The petition is dismissed" (21a). The foregoing is to succinctly state that plaintiffs' "breach of contract claims" were not then "ripe" to be coupled in any manner with the Court's decision on petitioners' restricted "Motion For Summary Judgment". The Court, lacking specific subject jurisdiction, as relating to the said "breach of contract claims", was without judicial authority to indiscriminately couple and dismiss the then pending and unadjudicated "breach of contract claims". The latter <u>just because they were contained in the same original petition</u> with the remanded administrative claims. The Court was not then empowered to: "throw out the baby with the bath wa-

ter."

Accordingly, it is submitted that the "breach of contract claims" should not have been included in the Court's "Order" on "Plaintiffs' Motion For Summary Judgment", as involving only the administrative claims as had been remanded to the Board of Contract Appeals. The bifurcated "breach of contract claims" should still, as of this date, have their former pending status. Thus the Court of Claims on February 6, 1981 etc. rendered a void order by dismissing the plaintiffs' entire petition as filed 5 July 1972, and as a consequence its orders of February 6, 1981 and May 15, 1981 etc. are defective and should be vacated as a void judgment in that the said jurisdictional defect is apparent on the face of the record; and this Court is re-

spectfully requested to take note thereof and rule accordingly.

ADDITIONAL PERTINENT FACTS

The Court of Claims' Order dismissing plaintiffs' petition of 5 July 1972 is dated February 6, 1981 (1a); and Plaintiffs' "Motion For Rehearing" was denied by the Court on May 15, 1981 (21a). Following plaintiffs' letter of September 19, 1981 to the Court's Trial Judge (67a), the Court Clerk responded by letter dated September 24, 1981 (74a) and for the first time officially informed plaintiffs their petition of 5 July 1972 was dismissed "in toto". Plaintiffs subsequently filed their Motion, Brief and Appendix for the Court's Order, under its Rule 152 to "Vacate the Court's Orders of February 6, 1981 and May 15, 1981" respectively. Plaintiffs'

Motion was filed prior to May 15, 1982, approximately eight months after the receipt of the Clerk's advices supra. As pertinent to the totality of the foregoing, pp. 1 to 64 inclusive, and to all the unusual facts and circumstances as recited therein:

Petitioners submit that the time within which to submit their appeal to the Court of Claims under its Rule 152 was May 15, 1982. The latter date as predicated on this Court's ruling in Communist Party of Indiana v. Whitcomb, 441 U.S. 445; and possibly after May 15, 1982, as otherwise predicated on the Court of Claims Clerk's notice dated September 24, 1981 supra; and or thereafter as predicated on the Court of Claims' defective and void "ORDERS" of February 6, 1981 and May 15,

1981 respectively supra.

Petitioners are of the belief that the particular circumstances of this case are to the effect that the great reservoir of equitable power that resides in the Supreme Court of the United States--Radack v. Norwegian American Line Agency Inc., 318 F.2d 538--should be similarly extended in this case to the petitioners in the form of its discretionary dispensing power over any inherent limitation of time within which petitioners were required to appeal to the Court of Claims as pertinent to its Rule 152 supra (see 1a, 21a, 22a and 27a).

REASONS FOR GRANTING THE WRIT AND CONCLUSION AND PRAYER

Petitioners as predicated on the totality of the foregoing submit that the record shows:

(a) They were denied constitutional "procedural due process" by the Engineers Board of Contract Appeals; and in turn by

(b) The Court of Claims who erroneously ruled petitioners had not been denied their constitutional right to "due process" by the Engineers Board of Contract Appeals etc., and further

(c) The Court of Claims erroneously, and wrongfully dismissed plaintiffs' petition of July 5, 1972. The latter despite the fact it lacked "specific subject matter jurisdiction" to dismiss petitioners' "breach of contract claims" as were included in plaintiffs' bifurcated petition

as filed July 5, 1972.

(d) Petitioners further assert that there exists serious conflicts between the several Agency Boards of Contract Appeals as are fully set out herein, as to the proper interpretation to be placed upon basically similar regulations; and such serious conflicts should be resolved by this Court's decisions herein.

WHEREFORE petitioners pray that this Honorable Court, in its endeavors to resolve the several matters and conflicts listed above, will grant certiorari to them, and thereby potentially supply petitioners the relief to which they firmly believe they are entitled; and correlatively thereby ease the paths of other like litigants who might otherwise in the future be confronted with the same difficulties and

and torturous administrative difficulties as has been the petitioners' protracted lot herein.

Respectfully submitted,

Edmond and E. John Pfotzer
Co-partners - pro se

E. John Pfotzer - pro se